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In The

Supreme Court of the United States

October Term, 1997

PETER MAIER, P.E.; INTERMOUNTAIN WATER ALLIANCE; ATLANTIC STATES LEGAL FOUNDATION; and KAY HENRY,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and CAROL BROWNER, Administrator, United States Environmental Protection Agency,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioners Peter Maier, P.E. *et al.* ("Maier") now reply to the Brief for the Respondents in Opposition filed by the United States Environmental Protection Agency *et al.* ("EPA"). For the following reasons, EPA has not shown that the petition for writ of certiorari should be denied.

I. EPA HAS NOT REBUTTED THAT THE MAJORITY BELOW ANNOUNCED A STANDARD OF REVIEW THAT IS IN CONFLICT WITH *CHEVRON*

As Maier argued in his petition, the majority opinion below announced a standard of review which contradicts the standard announced in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ("*Chevron*"), by stating that it could provide its own statutory interpretation of an ambiguous provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(b)(1)(B), which interpretation has not been advanced by EPA. See Pet. at 7-10. EPA has failed to show that the majority's articulation of its view of the *Chevron* standard is consistent with *Chevron*, nor has EPA even asserted that the particular statutory interpretation of the CWA announced by the majority below has been advanced by EPA itself. For these reasons, EPA has not rebutted that the majority opinion announced a legal standard that is in conflict with this Court's decision in *Chevron*, and so the Court should grant Maier's petition for writ of certiorari.

EPA completely ignores the standard of review announced in the majority's opinion, most clearly stated in the majority's response to the dissent's assertion that it had improperly articulated the *Chevron* standard:

> [W]e may not avoid construing the statute to the extent necessary to determine that the agency's regulations are not "manifestly contrary to statute."

App. A at 30 n.17, quoting *Chevron*, 467 U.S. at 844; see Pet. at 8. This pronouncement stands the *Chevron* standard on its head: under the majority's announced standard of review, a court must interpret a statute's meaning in a manner necessary to justify an agency's regulation (even if it means providing an interpretation not offered by the agency), instead of, as *Chevron* mandates, upholding an regulation only where it is based upon an agency's reasonable interpretation of an ambiguous statutory provision. *See* 467 U.S. at 842-43.

The EPA does not address the standard of review announced by the majority, but instead argues that "the court performed its judicial function under the *Chevron* framework of determining whether the statute confers discretion," concluding that the majority was analyzing section 1311(b)(1)(B) under the first "clear intent" step of *Chevron*, rather than the second "permissible interpretation" step. EPA Br. at 9. Under EPA's and the majority's view, once a statutory provision is deemed ambiguous under the first step, the agency does not just get deference to its interpretation of that statutory provision as part of the second step, but rather gets generalized deference to the ultimate decision before it.

In contrast, *Chevron* states that where a statutory provision is ambiguous, "the question for the court is whether the agency's answer is *based on* a permissible construction of the statute." 467 U.S. at 843 (emphasis added). Thus, the agency's ultimate "answer" must be supported by a "permissible construction of the statute" upon which the agency's answer relies. The majority below deviated from this standard by granting generalized deference to EPA's "answer" (that NOD and nutrients need not be included in the secondary treatment regulations), without even being provided by EPA with a construction of the statutory provision the majority relied upon, let alone a "permissible" one.

If EPA had made the argument that its decision to deny Maier's rulemaking petition was correct because the phrase "based upon" from section 1311(b)(1)(B) allowed it to define secondary treatment in a way that did not include NOD and nutrients, and that interpretation of section 1311(b)(1)(B) was in fact deemed permissible, then the *Chevron* standard would have been correctly announced and applied. But that is not what happened. EPA never interpreted section 1311(b)(1)(B) in this fashion- in fact, nowhere in the administrative proceeding or in the party's briefs in the Court of Appeals was the meaning of "based upon" in section 1311(b)(1)(B) even raised- EPA never thought it relevant to its decision.

The majority and EPA's confusion regarding the manner in which deference is granted under *Chevron* can be further seen in EPA's assertion that it does not necessarily disagree with the majority's interpretation of section 1311(b)(1)(B). See EPA Br. at 10. EPA does not actually point to any place where EPA has interpreted the phrase "based upon" from section 1311(b)(1)(B) as the

majority did- and tellingly, does not assert that it agrees with the majority's interpretation of that phrase now. Instead, EPA again turns the issue from one of deference to an agency's particular statutory interpretation, warranted under *Chevron*, into an issue of general deference to the agency's ultimate decision, by arguing that "[t]he EPA specifically concluded that a generally-applicable secondary treatment standard for NOD is not appropriate . . .." EPA Br. at 10.

Of course EPA concluded this- that was the ultimate decision challenged by Maier. But that conclusion says nothing about EPA's opinion regarding whether the term "based upon" from section 1311(b)(1)(B) means "equal to," as the dissent indicated EPA had always interpreted it, or whether it means "guided by," as the majority interpreted it *de novo*. See App. A at 29, 38-43. Deference to an agency position has to be based on a particular statutory provision, which is ambiguous and for which the agency has articulated a reasonable interpretation. Where, as here, the agency's ultimate decision does not rest on the statutory term relied upon by the Court, let alone on an interpretation of that provision offered by the agency, the Court has improperly implemented *Chevron*. Because the majority below not only failed to properly follow *Chevron*, but also announced a standard of review that contradicts it, granting the writ of certiorari is particularly warranted.

II. EPA HAS NOT REBUTTED THAT THE MAJORITY'S DECISION BELOW CONFLICTS WITH *EPA v. CALIFORNIA*

EPA seeks to minimize the conflict of the majority opinion below with *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976) (*"EPA v. California"*), by misstating Maier's argument. However, this approach does not effectively address the conflict between the two opinions, and fails to rebut that Maier's petition for writ of certiorari should be granted for this reason as well.

EPA re-states Maier's argument as "the CWA requires the EPA to impose technology-based effluent limitations on POTWs[1] in every instance in which they might conceivably be applied." EPA Br. at 12. However, this is not Maier's argument; rather, it is that the CWA, as interpreted by this Court in *EPA v. California*, requires that nationwide effluent limitations be based solely on technological feasibility, whereas in contrast, the majority below abandoned this principle and allowed EPA to issue its decision regarding nationwide effluent limitations for POTWs based on water quality considerations. *See* Pet. at 10-11.

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[1]. "POTWs" stands for publicly-owned treatment works, *i.e.*, sewage treatment plants. *See* 40 C.F.R. Part 133.

> The dissent below summarized the conflict well:
>
> In allowing the substitution of quality-based controls for generally-applicable, technology-based effluent limitations, the majority allows the EPA to return clean water regulation to the pre-1972 era.

App. A at 38, *quoted in* Pet. at 12; *see* dissent's discussion of *EPA v. California* in App. A at 46-47. EPA's misstatement of Maier's argument, with a corresponding failure to address the conflict between the majority opinion below and *EPA v. California*, does not address this crucial point. For this reason, EPA has not rebutted that this petition should be granted for this reason as well.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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